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448608—57

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 603

JACK ROBERT PURDOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. A 1–11) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered October 14, 1957. The petition for a writ of certiorari was filed November 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a person convicted of entry into a bank with intent to commit larceny and of larceny of the bank's property may be sentenced to the maximum

established for the crime of entry, rather than the lower maximum fixed for larceny.

STATUTE INVOLVED

The Act of May 18, 1934, ch. 304, Section 2, 48 Stat. 783, as amended by the Act of August 24, 1937, ch. 747, 50 Stat. 749, 12 U. S. C. (1946 ed.) 588b, provided in pertinent part as follows:

> § 588b:
>
> (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> * * * * *

STATEMENT

In April, 1947, in the United States District Court for the District of Kansas, petitioner pleaded guilty (R. 3) to an information charging, in the first count, that on January 9, 1947, he entered a federally insured bank with intent to commit larceny, and in the second count that he stole $591.95 belonging to the bank (R. 2). He was sentenced to twenty years for the entry and ten years for the larceny, the sentences to run consecutively (R. 3).

In May, 1957, he filed a motion to vacate the sentence on the entry count, alleging that he could be sentenced only for the completed larceny (R. 4). The district court vacated the sentence on count 2 charging larceny and sentenced petitioner *nunc pro tunc* to twenty years on count 1 which charged entry with intent to commit larceny (R. 5). The Court of Appeals affirmed, holding that petitioner could properly be sentenced on the entry count.[1]

ARGUMENT

Petitioner argues that even though entry into a bank with intent to commit a felony was made subject to a maximum penalty of twenty years (presumably because the entry could be a forcible one in the nighttime as well as a peaceful one in the daytime), if that entry is followed by a successful theft, the maximum punishment is reduced to ten years. By his logic, as the court below pointed out, the completed theft of

[1] Petitioner also pleaded guilty to a third count charging transportation of a stolen vehicle. He received a sentence of five years on that count to run concurrently with the sentence on the other counts (R. 5). That count is not here involved.

less than $50 would reduce the penalty to one year, whereas an entry with intent to steal which proves unsuccessful would still remain subject to the maximum penalty of twenty years. Nothing in the decision of this Court in *Prince* v. *United States,* 352 U. S. 322, compels the attribution to Congress of so illogical and inconsistent an intent.

In *Prince,* this Court had before it the question whether consecutive sentences could validly be imposed under the Bank Robbery Act for entering a bank with intent to rob and for robbery. The statute provided a twenty-year maximum for the robbery (twenty-five in the aggravated form) and for the entry. This Court held, as a matter of statutory construction, that "when Congress made either robbery or an entry for that purpose a crime it intended that the maximum punishment for robbery should remain at 20 years, but that, even if the culprit should fall short of accomplishing his purpose, he could be imprisoned for 20 years for entering with felonious intent." 352 U. S. at p. 329. The Court pointed out that in 1934 Congress had made only robbery and its aggravated forms the offense, and that the 1937 amendments, creating the offenses of unlawful entry and larceny, had the purpose of establishing lesser offenses. 322 U. S. at pp. 325–327.

That same legislative history shows that the decision below as to entry and larceny is correct as a matter of statutory construction. The crime of felonious entry, with a twenty-year maximum, was created at the very same time as the crime of larceny with either a one-year or a ten-year maximum. Obvi-

ously, therefore, Congress regarded the crime of entering, which could be a forcible breaking in the nighttime, as a more serious offense than the taking of the money. The legislative history of the 1937 amendments, set forth at pp. 24–28 of the government's brief in *Prince* (No. 132, O. T. 1956), shows that the larceny provisions were inserted primarily to take care of the situation where a person already lawfully in the bank engaged in theft. Thus the Attorney General, in suggesting the 1937 amendments, mentioned the situation of a man who had taken $11,000 during a momentary absence of one of the employees. See 352 U. S. at p. 326. The distinction between grand and petit larceny came in response to Representative Wolcott's objection that the bill "puts simple larceny on the same plane as robbery and breaking and entering in an attempt to commit larceny." 81 Cong. Rec. 4656. The ensuing colloquy further clarifies the Congressional thinking to the effect that at least a forcible entry, breaking and entering, was a more serious crime than larceny:

> Mr. RANKIN. How are you going to tell what a thief is going to do when he gets into a bank? If a man breaks into a house or bank he will kill anyone in it to carry out his purpose.
>
> Mr. WOLCOTT. If the gentleman will read the bill and report, he will see that it not only punishes for robbery, which is putting in fear, and breaking and entering, but the larceny of anything within the bank, whether the man is there lawfully or not. If a man should go into a bank to make a deposit and pick up a pencil and walk out with it he would be on the same

> plane, according to this bill, as a man who deliberately broke in during the nighttime and committed larceny. I know the gentleman does not agree with that.
>
> Mr. RANKIN. I do not, but if a man breaks into a house he is going to commit a crime.
>
> Mr. WOLCOTT. There is no question about that. Breaking and entering is a crime in and of itself. [81 Cong. Rec, 4656]

We, of course, accept the implicit holding of the district court that Congress did not intend to punish separately both the entry and the larceny after the entry; that a defendant is subject to one punishment or the other. What the legislative history makes very clear is that the larceny provision, with its ten-year maximum, was directed at simple stealing without an unlawful entry, and that Congress did not intend that the larceny provision should displace the penalty for felonious entry.

Petitioner relies upon the following language of *Prince* to support his position that, however incongruous the result, the entry must be deemed to have been merged into a succesful larceny (352 U. S. at p. 328):

> It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public

door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated.

This language cannot, however, be divorced from the issue in *Prince* to which it was addressed[2]—whether consecutive sentences could be given for the completed crime of robbery, which Congress first made a crime, and for the crime of entry, which Congress later added, bearing the same or lesser punishment. The whole *Prince* opinion makes it clear that, in speaking of merger, the Court was not dealing with merger in the common law or double jeopardy sense of a crime which could not constitutionally be a separate offense. The *Prince* decision is based wholly on the intent of Congress as shown by the words of the statute and the legislative history. As discussed above, the legislative history of the larceny provision is different from that of the robbery provision, and the legislative history makes explicit, what the maximum punishments provided in the statute suggest, that Congress regarded the crime of felonious entry as potentially more dangerous than larceny. Since the *Prince* decision rests on legislative intent, it does not require that the larceny provisions, with their separate legislative history, be equated to the robbery provisions. The statute is reasonably read, as the courts below in this case have read it, to provide that, where a larceny follows a felonious entry, punishment

[2] The Court specifically noted in *Prince* that "The question of interpretation is a narrow one, and our decision should be correspondingly narrow." 352 U. S. at p. 325.

may be fixed under the maximum provided for the felonious entry. The lesser punishments for larceny can be interpreted as applying to a simple theft after lawful entry.

There is no conflict of circuits on this issue. As petitioner himself notes (Pet. 10), the Court of Appeals for the Eighth Circuit has ruled, in accord with the decision below, that, while a defendant may not be punished for both the entry and the larceny, the sentence may be imposed on the entry count in accordance with the punishment fixed by Congress for that offense. *Kitts* v. *United States*, 243 F. 2d 883. The District Court for the Southern District of Florida felt compelled by the *Prince* decision to vacate sentence on the entry count and punish only for the larceny in *United States* v. *Williamson* (Pet. 11–12), and an appeal has been noted from that decision.[3] So far as we know, these are the only decisions on the specific problem here involved.

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[3] If the Fifth Circuit should affirm in *Williamson*, thus creating a conflict in circuits, and if the issue should ultimately be resolved adversely to the government, petitioner would be able to renew his application to vacate the sentence since, as the records of his case would show, the sentence would be unlawful.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorney.

DECEMBER 1957.